



November 26, 2002

Ms. Carol Longoria
Public Information Coordinator
University of Texas System
201 West 7th Street
Austin, Texas 78701-2981

OR2002-6791

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172718.

The University of Texas M.D. Anderson Cancer Center ("M.D. Anderson") received a request for nine categories of information relating to research involving chimpanzees. You inform us that M.D. Anderson does not have a portion of the requested information. You claim that the remaining requested information is excepted from disclosure pursuant to sections 552.101, 552.104, and 552.110 of the Government Code. You also state, and provide documentation showing, that you notified nine interested third parties of the request for information.¹ We have considered all claimed exceptions and have reviewed the submitted information, which includes representative sample documents.²

¹See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act (the "Act") in certain circumstances).

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We first address your argument for withholding the information in Tab 6. You argue that this information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code.³ Section 51.914 of the Education Code provides in pertinent part:

In order to protect the actual or potential value, the following information shall be confidential and shall not be subject to disclosure under Chapter 552, Government Code, or otherwise:

(1) all information relating to a product, device, or process, the application or use of such a product, device, or process, and all technological and scientific information (including computer programs) developed in whole or in part at a state institution of higher education, regardless of whether patentable or capable of being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee[.]

(2) any information relating to a product, device, or process, the application or use of such product, device, or process, and any technological and scientific information (including computer programs) that is the proprietary information of a person, partnership, corporation, or federal agency that has been disclosed to an institution of higher education solely for the purposes of a written research contract or grant that contains a provision prohibiting the institution of higher education from disclosing such proprietary information to third persons or parties[.]

Educ. Code § 51.914(1), (2). The purpose of section 51.914(1) is to protect the “actual or potential value” of technological and scientific information developed in whole or in part at a state institution of higher education. *See* Open Records Decision No. 497 at 6 (1988) (interpreting former Education Code section 51.911). Whether particular scientific information has such a potential is a question of fact that this office is unable to resolve in the opinion process. *See* Open Records Decision No. 651 (1997). Thus, this office has stated that in considering whether requested information has “a potential for being sold, traded, or licensed for a fee,” we will rely on a university’s assertion that the information has this potential. *See id.*

³ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by other statutes.

You state that disclosure of the research protocols, pictures, videotapes of procedures using chimpanzees, and related correspondence submitted in Tab 6 would directly reveal the substance of M.D.Anderson's chimpanzee research and would permit third parties to appropriate such research. You state that

[n]otably, M.D. Anderson has developed unique products and procedures in connection with its chimpanzee research. For example, [the University of Texas] maintains state-of-the-art housing that allows chimpanzees to reside in family groups within large outdoor enclosures designed and constructed by M.D. Anderson. The University has also developed unique devices and procedures through which the chimpanzees, on a voluntary basis, allow attendants to draw blood, collect samples, and conduct physical examinations. The type of information reflected in the protocols, photographs and videos of procedures (and correspondence including such information) does have the potential for being sold, traded, or licensed for a fee. Research discoveries and inventions are a product of the data collected and developed by the researchers. In addition to conducting its own research using data such as breeding, records dealing with chimpanzee care, necropsy reports, and histopathology reports (including information contained in e-mails and other correspondence related to these documents), M.D. Anderson can potentially sell or license this information for a fee to other researchers, or other third parties interested in such primate- related records.

In addition, with regard to the research protocols in Tabs 6 and 8, you state

. . . M.D. Anderson is an institution of higher education that enters into sponsored research agreements with third parties (i.e., researchers, bio-tech companies and state and federal agencies) pursuant to which the third parties conduct chimpanzee-related research in corroboration with M.D. Anderson and/or with information developed by M.D. Anderson. A number of the protocols that are responsive to the request were developed by such third parties and were submitted to M.D. Anderson solely for the purposes of their written research contract with [the University of Texas]. As evidence that these third parties consider their protocols to be their proprietary information, each contract contains a provision prohibiting M.D. Anderson from disclosing such proprietary information. Further, pursuant to these contracts the raw data and reports generated are often considered the proprietary information of the third party.

Based on our review of your arguments and the information in Tabs 6 and 8, we conclude that this information is confidential in its entirety under section 51.914 of the Education Code. Accordingly, the system must withhold from requestor the information in Tabs 6 and 8 under section 552.101 of the Government Code. As we are able to make this

determination, we need not address the third parties' arguments for withholding the research protocols.

We next address your arguments for withholding the information in Tab 7. You argue that this information is made confidential under section 161.032 of the Health and Safety Code and is therefore excepted from disclosure under section 552.101. Section 161.032 of the Health and Safety Code provides in part:

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena. ... Records, information, or reports of a medical committee ... and records, information, or reports provided by a medical committee ... to the governing body of a public hospital ... are not subject to disclosure under Chapter 552, Government Code.

....

(c) This section ... do[es] not apply to records made or maintained in the regular course of business by a hospital

Health & Safety Code § 161.032(a), (c). For purposes of this confidentiality provision, a "medical committee" includes any committee, including a joint committee, of ... a hospital[or] a medical organization" Health & Safety Code § 161.031(a). The term "medical committee" also includes "a committee, including a joint committee, of one or more of the entities listed in Subsection (a)." *Id.* § 161.031(c). Section 161.0315 provides in relevant part that "[t]he governing body of a hospital [or] medical organization ... may form ... a medical committee, as defined by section 161.031, to evaluate medical and health care services" Health & Safety Code § 161.0315(a).

You state that the information in Tab 7 comprises records and proceedings of M.D. Anderson's Institutional Animal Care and Use Committee (the "committee"). Based on your arguments and our review of the information in Tab 7, we find that the committee is a medical committee for purposes of subchapter D of chapter 161 of the Health and Safety Code. *See* Health & Safety Code § 161.031(a). Therefore, the submitted information in Tab 7 is confidential under section 161.032 of the Health and Safety Code and must be withheld under section 552.101 of the Government Code. *See Jordan v. Court of Appeals*, 701 S.W.2d 644, 648 (Tex. 1985) (court found privilege extends to minutes of committee meetings, correspondence between members relating to deliberation process, and any final committee product). As we are able to make this determination, we need not address your other argument for the information in Tab 7.

Finally, you argue that the information in Tab 9, as well as any other information to be released to the requestor, which identifies individuals involved in the subject research, should be de-identified prior to release under section 552.101 in conjunction with a right of privacy. We first note in this regard that the type of information you seek to withhold is generally

considered to be expressly public under section 552.022 of the Government Code. *See* Gov't Code § 552.022(a)(2) (name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of governmental body is public unless expressly confidential under other law). Under section 552.101, this office has determined that information may be withheld from public disclosure in special circumstances. *See* Open Records Decision No. 169 (1977). We consider "special circumstances" to refer to a very narrow set of situations in which release of the information would likely cause an imminent threat of harm. *Id.* at 6. An assertion of a generalized and speculative fear of harm does not satisfy the "special circumstances" standard. *Id.* This office further noted that the initial determination of the existence of an imminent threat of harm should be made by the governmental body to which a request for disclosure is directed, and this office will determine whether a governmental body has demonstrated the existence of special circumstances on a case-by-case basis. *Id.* at 7.

You have provided us with a variety of information pertaining to the actions and goals of certain animal rights groups, including In Defense of Animals ("IDA"), the group to which the requestor belongs, and argue that "providing detailed information about our research facility's operation/research and staff members involved in animal testing, to IDA, would place researchers and all associated persons in grave danger." However, after careful review of your arguments and the supporting information, we find that your assertion of danger posed by the IDA to M.D. Anderson and its researchers is generalized and speculative. The concerns you have expressed and the information you have provided pertaining to the actions of these groups are in the nature of rumor and speculation. Rumor and speculation are insufficient to demonstrate the existence of special circumstances. You have not shown that the requestor or IDA have been proven to engage in practices that have resulted in physical harm to the individuals at issue. Moreover, we find that you have not demonstrated that release of the identifying information of the individuals whose names appear in the information at issue would subject these individuals to an imminent risk of harm. Therefore, we conclude that you may not withhold such identifying information from the records to be released in Tab 9.

We note, however, that Tab 9 contains e-mail addresses that are excepted from public disclosure under section 552.137 of the Government Code. Section 552.137 provides that "[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Public Information Act]." Therefore, unless the relevant individuals have affirmatively consented to the release of their e-mail addresses, M.D. Anderson must withhold the e-mail addresses in Tab 9, a representative sample of which we have marked, under section 552.137.

In summary, M.D. Anderson must withhold from the requestor all of the information in Tabs 6 and 8, including the submitted videotape, pursuant to section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. The information in Tab 7

must be withheld under section 552.101 in conjunction with section 161.032 of the Health and Safety Code. Unless the members of the public in question have affirmatively consented to their release, M.D. Anderson must withhold the email addresses contained within the information in Tab 9, a representative sample of which we have marked, pursuant to section 552.137 of the Government Code. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jh

Ref: ID# 172718

Enc. Marked documents

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